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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

12 PATRICIA HARRELL,  
13 Plaintiff,  
14 v.  
15 CITY OF GILROY, et al.,  
16 Defendants.

Case No. 17-CV-05204-LHK

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS**

Re: Dkt. No. 78

18 Before the Court is Defendants City of Gilroy, Gilroy Police Department (“City  
19 Defendants”), Gilroy Police Chief Denise Turner, Captain Joseph Deras, Captain Kurt Svardal,  
20 Communications Supervisor Steven Ynzunza, and Human Resources Director/Risk Manager  
21 LeeAnn McPhillips’ (“Individual Defendants”) (collectively, “Defendants”) motion to dismiss the  
22 second amended complaint (“SAC”). Having considered the submissions of the parties, the  
23 relevant law, and the record in this case, the Court GRANTS in part and DENIES in part  
24 Defendants’ motion to dismiss the SAC.

25 **I. BACKGROUND**

26 **A. Factual Background**

27 Plaintiff Patricia Harrell (“Harrell”) worked as a Public Safety Communicator for the

1 Gilroy Police Department (“GPD”) for about 26 years. Second Amended Complaint (“SAC”),  
2 ECF No. 72 ¶ 16. Harrell was terminated on March 21, 2016, based on Harrell’s alleged  
3 misconduct toward Harrell’s trainees. *Id.* ¶ 90. Harrell disputes that she mistreated her trainees.

4 Harrell alleges that the GPD had a pervasive culture of sexual misconduct and that she was  
5 fired in retaliation for her refusal to condone or engage in the culture of sexual misconduct. *Id.*  
6 ¶¶ 20–23. Harrell alleges a range of sexual misconduct, including police officers having sex with  
7 members of the Gilroy Explorers, a group for 14 to 21 year olds; sexually explicit conversations  
8 between employees at work; supervisors watching pornography in front of their employees outside  
9 the workplace; and nudity at work-sponsored social events, among other things. *Id.* ¶¶ 21a–21n.  
10 Harrell alleges that the GPD retaliated against Harrell because Harrell “refused to engage in the  
11 aforementioned sexual activity or condone the sexually charged culture of the GPD.” *Id.* ¶ 23.

12 Harrell alleges that in 2002, the GPD instituted a new system for dispatchers and assigned  
13 Harrell as the lead because Ynzunza “was improperly managing the project.” Over the following  
14 decade, Ynzunza prevented Harrell from training on new software systems necessary to her job  
15 functions. *Id.* ¶¶ 24–32.

16 On November 20, 2005, Harrell left her shift 14 minutes early because a call came in that  
17 Officer Ray Hernandez, a close friend of Harrell’s, was unconscious and not breathing. *Id.* ¶¶ 33–  
18 35. Harrell left work to go to Officer Hernandez’s home. *Id.* ¶ 36. Officer Hernandez died that  
19 night from a heart attack. Harrell was later disciplined for leaving her post early. She contends  
20 the discipline was unwarranted. *Id.* ¶¶ 37–39.

21 In about 2006, Harrell insisted that officers follow protocol in their radio communications  
22 with dispatch. Harrell alleges that in retaliation for her efforts to instill professionalism, the  
23 officers refused to acknowledge her presence, speak to her, or look at her. Officer Geoff Guerin  
24 later tearfully acknowledged to Harrell that the officers had been instructed by their sergeant to  
25 ignore Harrell. *Id.* ¶¶ 40–44. At an unspecified time, Harrell confronted then-Sergeant Deras  
26 about Sergeant Deras’s rude treatment of Harrell. During the meeting, Sergeant Deras screamed at  
27 Harrell, “You and the people who have been here a long time think your shit don’t stink.” *Id.* ¶

1 44.

2 Harrell alleges that in 2008 she received a written reprimand after warning Julie Ines, a  
3 GPD employee, to be careful around Officer Royce Heath and his wife Andrea Arthur, another  
4 GPD employee. Harrell alleges that Officer Heath and Arthur are frequently involved in sexual  
5 misconduct together. Harrell alleges that her supervisors knew of and acknowledged Ms. Arthur's  
6 inappropriate behavior but nevertheless disciplined Harrell. *Id.* ¶¶ 45–53.

7 Harrell alleges that in 2008, Harrell sent an internal complaint to Ynzunza and non-party  
8 Captain Moore “providing a summary and documentation of incidents when Ms. Harrell felt  
9 scared and afraid of [Officer] Heath.” *Id.* ¶ 54. Harrell alleges that Captain Moore’s solution to  
10 Officer Heath’s conduct was ineffective, and that around that time, she received threatening notes  
11 in her mailbox at work and on her car. One note on her car allegedly said, “Better watch your  
12 back, bitch.” *Id.* ¶¶ 56–57. In addition, between 2008 through Harrell’s termination in March  
13 2016, officers bombarded Harrell with questions on calls over the radio and entered her work  
14 space to intimidate her. *Id.* ¶¶ 58–61.

15 At another unspecified time, Sergeant Deras’s wife Faustina was attempting to become a  
16 GPD dispatcher. As the senior dispatcher, Harrell would ordinarily have had final approval over  
17 Faustina’s hiring, but that responsibility was taken away from Harrell because Sergeant Deras  
18 disliked Harrell. *Id.* ¶¶ 62–65.

19 Sergeant Deras was promoted to Captain in 2014. *Id.* ¶ 66. Harrell alleges that in May  
20 2014, even though Harrell was the most senior dispatcher, and thus entitled by custom to choose  
21 which shifts to work, Captain Deras began assigning her to undesirable night and weekend shifts  
22 and allowed younger, less experienced female dispatchers to take the more favorable weekday  
23 shifts. *Id.* ¶ 67. Captain Deras also overloaded Harrell with dispatch duties, training duties, and  
24 overtime. When Harrell complained that the work was too much for one person to handle, Captain  
25 Deras gave Harrell even more work and began excluding her from communications department  
26 meetings. *Id.* ¶¶ 68–72.

27 Harrell alleges that she was investigated without justification again in 2015. *Id.* ¶¶ 73–91.

1 The investigation was related to Harrell’s alleged mistreatment of her trainees and an alleged  
2 discriminatory remark, in which Harrell commented to one of her Latina trainees that the trainee  
3 “might be mistaken for the cleaning lady.” *Id.* ¶¶ 76–79. Harrell denies that she mistreated her  
4 trainees and argues that the remark was taken out of context. Harrell states that Harrell is half  
5 Salvadoran and half Native American, and had told the trainee that Harrell had been mistaken for  
6 a cleaning lady when at a public safety conference in Colorado. When the trainee commented that  
7 people “sometimes look[ed] at [her] funny” in her gated community, Harrell commented that  
8 perhaps the other residents mistook the trainee for the cleaning lady, as had happened to Harrell in  
9 Colorado. *Id.* ¶ 77.

10 Harrell alleges that the 2015 investigation was biased. One female trainee interviewed  
11 during the investigation accused Harrell of having “preconceptions” about the trainee. The trainee  
12 also stated, “we know how women are.” *Id.* ¶ 85. The investigation concluded that Harrell “uses  
13 bullying behaviors that are detrimental to the effective training and retention of dispatchers.” *Id.* ¶  
14 89. The GPD placed Harrell on paid administrative leave in January 2016 and terminated her on  
15 March 21, 2016. *Id.* ¶ 90.

16 On March 28, 2016, Harrell’s attorney appealed Harrell’s termination and requested a  
17 hearing before the City of Gilroy Personnel Board. *Id.* ¶ 92; *see Ex. B to SAC, ECF No. 72-2.* On  
18 June 6, 2016, a representative from Harrell’s union, the American Federation of State, County and  
19 Municipal Employees (“AFSCME”), met with the GPD and told the GPD that Officer Heath had  
20 sexually harassed Harrell and that Harrell planned to assert a retaliation claim. *Ex. C to SAC,*  
21 *ECF No. 73-3.* After an investigation of Harrell’s claims, McPhillips concluded that “the alleged  
22 acts of sexual harassment did not occur.” *Id.* ¶¶ 92–95; *see Ex. C to SAC.*

23 On December 29, 2016, Harrell filed complaints with the EEOC and California’s  
24 Department of Fair Employment and Housing (“DFEH”) against the City of Gilroy, Chief Turner,  
25 Officer Heath, and Captain Deras, in which she alleged discrimination based on her age and sex.  
26 *Ex. A to SAC, ECF No. 72-1.* On May 17, 2017, Harrell’s counsel amended the DFEH complaint  
27 to add respondents Ynzunza and McPhillips. *See id.* at 10. On May 24, 2017, Harrell received a

1 right-to-sue notice from DFEH. *Id.* at 12.

2 **B. Procedural History**

3 On August 7, 2017, Harrell filed a complaint in state court against the City of Gilroy, GPD  
4 (which is a department of the City of Gilroy), AFSCME, and Does 1-50. ECF No. 1-1 at 6. The  
5 state court complaint contained 13 causes of action: (1) age discrimination (Cal. Gov. Code  
6 § 12940); (2) gender discrimination (Cal. Gov. Code § 12940); (3) sexual harassment (Cal. Gov.  
7 Code § 12940); (4) failure to prevent discrimination and harassment (Cal. Gov. Code § 12940(k));  
8 (5) whistleblower retaliation (Cal. Labor Code § 1102.5); (6) retaliation (Cal. Gov. Code  
9 § 12940); (7) wrongful termination in violation of public policy; (8) breach of duty of fair  
10 representation; (9) negligent and intentional misrepresentation; (10) negligent and intentional  
11 infliction of emotional distress; (11) breach of written and implied-in-fact contract; (12) breach of  
12 the implied covenant of good faith and fair dealing; and (13) federal civil rights violation (42  
13 U.S.C. § 1983). The first through seventh and thirteenth causes of action were against City  
14 Defendants. The eighth and ninth causes of action were against AFSCME. The tenth through  
15 twelfth causes of action were against all defendants. On September 8, 2017, City Defendants  
16 removed the case to federal court. ECF No. 1.

17 On September 15, 2017, City Defendants filed a motion to dismiss the complaint pursuant  
18 to Federal Rule of Civil Procedure 12(b)(6) and to strike portions of the complaint pursuant to  
19 Federal Rule of Civil Procedure 12(f). ECF No. 6. City Defendants argued that Harrell's seventh,  
20 eleventh, and twelfth causes of action failed as a matter of law because Harrell was a public  
21 employee. *Id.* at 3–4. City Defendants also argued that Harrell's fifth, seventh, tenth, eleventh,  
22 and twelfth causes of action must be dismissed because Harrell failed to allege timely compliance  
23 with the California Tort Claims Act. *Id.* at 4–5. Finally, City Defendants argued that Harrell's  
24 prayer for punitive damages should be stricken because punitive damages cannot be recovered  
25 against a public entity as a matter of law. *Id.* at 5–6.

26 Harrell's response to the motion to dismiss and strike was due September 29, 2017.  
27 Harrell did not file a response. On October 6, 2017, City Defendants filed a reply noting Harrell's

1 failure to oppose the motion to dismiss and strike. ECF No. 13.

2 On November 28, 2017, Harrell's counsel wrote a letter to the Court explaining that  
3 Harrell elected not to oppose the motion to dismiss and strike because Harrell intended to file an  
4 amended complaint "to address the issues raised by Defendants." ECF No. 46. Harrell requested  
5 that "the Court refrain from ruling on the Motion to Dismiss" because Harrell believed "that the  
6 amended pleading w[ould] resolve most, if not all of the objections raised by Defendants." *Id.*  
7 City Defendants' counsel responded with a letter that same day, in which City Defendants'  
8 counsel explained that Harrell's counsel had offered on October 12, 2017 to send a proposed  
9 amended complaint for City Defendants' review. ECF No. 47. However, as of November 28,  
10 2017, City Defendants had not received any proposed amended complaint for review. City  
11 Defendants stated that Harrell would not be allowed to amend her complaint without stipulation or  
12 the Court's permission pursuant to Rule 15. *Id.*

13 On November 30, 2017, the Court granted City Defendants' motion to dismiss with leave  
14 to amend. ECF No. 15.

15 On December 29, 2017, Harrell filed a first amended complaint ("FAC"). ECF No. 16.  
16 The FAC added several individual defendants, all of whom Harrell sued individually and in their  
17 official capacities. Specifically, the FAC added Chief Turner, Officer Heath, Captain Deras,  
18 Captain Svardal, Ynzunza, McPhillips, and John Tucker, the business agent of AFSCME. The  
19 FAC also dropped the whistleblower retaliation, wrongful termination, breach of duty of fair  
20 representation, breach of contract, and breach of covenant of good faith and fair dealing causes of  
21 action. *Compare* FAC at 1 with ECF No. 1-1 at 6.

22 The FAC added seven causes of action, including failure to investigate or take corrective  
23 action (Cal. Gov. Code § 12940), asserted against City Defendants; retaliatory termination (Cal.  
24 Gov. Code § 12940(h)), asserted against City Defendants; negligent supervision, asserted against  
25 AFSCME; negligence, asserted against Chief Turner, Officer Heath, Captain Deras, Captain  
26 Svardal, Ynzunza, McPhillips, AFSCME, and Tucker; assault, asserted against Officer Heath,  
27 Captain Deras, and Ynzunza; supervisory liability (42 U.S.C. § 1983), asserted against Chief

1 Turner, Officer Heath, Captain Deras, Captain Svardal, Ynzunza, and McPhillips; and retaliation  
2 (Title VII of the Civil Rights Act of 1964), asserted against City Defendants. *Compare* FAC at 1  
3 with ECF No. 1-1 at 6.

4 On January 11, 2018, City Defendants filed a motion to strike the FAC. ECF No. 17. On  
5 January 12, 2018, City Defendants filed an answer to the FAC. ECF No. 18. On January 25,  
6 2018, Harrell filed an opposition to the motion to strike. ECF No. 19. On February 1, 2018, City  
7 Defendants filed a reply. ECF No. 20. On February 28, 2018, AFSCME and Tucker filed a notice  
8 of non-opposition to City Defendants' motion to strike. ECF No. 35.

9 On February 21, 2018, AFSCME and Tucker filed a motion to dismiss the FAC. ECF No.  
10 32. On February 27, 2018, Deras, Heath, McPhillips, Turner, Ynzunza, and Svardal filed a motion  
11 to dismiss the FAC. ECF No. 34. On March 7, 2018, Harrell filed an opposition to the AFSCME  
12 Motion. ECF No. 40. On March 13, 2018, Harrell filed an opposition to the Officers' Motion.  
13 ECF No. 41. On March 14, 2018, AFSCME filed a reply. ECF No. 42. On March 20, 2018, the  
14 Officers filed a reply. ECF No. 44.

15 On May 25, 2018, the Court granted in part, denied in part, and deferred ruling on in part  
16 the City Defendants' motion to strike. ECF No. 48. The Court granted with prejudice the motion  
17 to strike the seventh cause of action for retaliatory termination as entirely redundant of the sixth  
18 cause of action for retaliation. *Id.* at 9–11. The Court denied the motion to strike the entire FAC  
19 as overbroad, and also denied the motion to strike the fifth cause of action after the Court found  
20 that the fourth cause of action for failure to prevent discrimination and harassment was not  
21 redundant of the fifth cause of action for failure to investigate or take corrective action. *Id.* at 10–  
22 11. The Court deferred ruling on City Defendants' California Tort Claims Act argument after  
23 determining that the argument was more properly construed as a motion to dismiss.

24 On August 13, 2018, the Court granted Individual Defendants' and AFCME's motions to  
25 dismiss the FAC and denied as moot the remaining argument in City Defendants' motion to strike.  
26 ECF No. 67.

27 Specifically, the Court granted Individual Defendants' motions to dismiss Harrell's causes  
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1 of action for sexual harassment and supervisory liability under § 1983 without prejudice. *Id.* at 9–  
2 13; 28–29. The Court also dismissed with prejudice Harrell’s causes of action against Individual  
3 Defendants for negligence, assault, and negligent and intentional infliction of emotional distress  
4 because Harrell did not timely allege compliance with the California Tort Claims Act. *Id.* at 21–  
5 28.

6 The Court granted AFSCME and Tucker’s motion to dismiss Harrell’s cause of action for  
7 failure to prevent discrimination with prejudice because Harrell failed to allege facts related to her  
8 AFSCME claim in her DFEH complaint. *Id.* at 13–17. In granting AFSCME’s motion, the Court  
9 noted that because City Defendants had not separately moved to dismiss Harrell’s cause of action  
10 for failure to prevent discrimination, the cause of action survived as to City Defendants. *Id.* at 13–  
11 14. The Court also granted AFSCME and Tucker’s motion to dismiss Harrell’s causes of action  
12 for negligent supervision, negligence, negligent and intentional infliction of emotional distress,  
13 and negligent and intentional misrepresentation as preempted. *Id.* at 17–21. The Court dismissed  
14 the causes of action without prejudice to Harrell bringing those four claims before the California  
15 Public Employment Relations Board (“PERB”). *Id.* at 21.

16 In sum, the Court dismissed with prejudice Harrell’s causes of action against Individual  
17 Defendants for negligence, assault, and negligent and intentional infliction of emotional distress.  
18 The Court dismissed with prejudice Harrell’s cause of action against AFSCME and Tucker for  
19 failure to prevent discrimination, but noted that the cause of action survived against City  
20 Defendants because they had not moved to dismiss the cause of action. The Court dismissed  
21 Harrell’s causes of action against AFSCME and Tucker for negligent supervision, negligence,  
22 negligent and intentional infliction of emotional distress, and negligent and intentional  
23 misrepresentation without prejudice to Harrell bringing those claims before the PERB. The Court  
24 dismissed without prejudice Harrell’s causes of action for sexual harassment and supervisory  
25 liability under § 1983. Finally, the Court stated that Harrell’s causes of action against the City  
26 Defendants for age discrimination, gender discrimination, failure to investigate or take corrective  
27 action, retaliation under Cal. Gov. Code § 12940, violation of civil rights under § 1983, and Title  
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1 VII retaliation survived because no party moved to dismiss those causes of action. *Id.* at 29.

2 The Court informed Harrell that if Harrell “fails to file an amended compliant within 30  
3 days or fails to cure the deficiencies identified in this order, the claims dismissed in this order will  
4 be dismissed with prejudice.” *Id.* at 30.

5 On September 12, 2018, Harrell filed the SAC, which includes eight causes of action. ECF  
6 No. 72 (“SAC”). Harrell re-alleged all seven causes of action from the FAC that City Defendants  
7 did not challenge, including her causes of action against City Defendants for age discrimination,  
8 gender discrimination, failure to prevent discrimination, failure to investigate, retaliation, violation  
9 of civil rights under § 1983, and Title VII retaliation. *Id.* ¶¶ 98–135, 168–178. In addition,  
10 Harrell amended her cause of action against Individual Defendants for supervisory liability under  
11 § 1983. *Id.* ¶¶ 136–167. The SAC dropped Harrell’s cause of action against Individual  
12 Defendants for sexual harassment. The SAC also dropped Officer Heath as a defendant.

13 On October 17, 2018, Defendants moved to dismiss the SAC. ECF No. 78 (“Mot.”). On  
14 October 31, 2018, Plaintiff filed an opposition. ECF No. 80 (“Opp.”). On November 9, 2018,  
15 Defendants filed their reply. ECF No. 82 (“Reply”).

16 **II. LEGAL STANDARD**

17 **A. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)**

18 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an  
19 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
20 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the  
21 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
22 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a  
23 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
24 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). For  
25 purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the  
26 complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving  
27 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

1        However, a court need not accept as true allegations contradicted by judicially noticeable  
2        facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the “[C]ourt may look  
3        beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)  
4        motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).  
5        Nor is the Court required to “assume the truth of legal conclusions merely because they are cast in  
6        the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per  
7        curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere  
8        “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to  
9        dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678.

10      **B. Leave to Amend**

11      Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely  
12     granted when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate  
13     decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d  
14     1122, 1127 (9th Cir. 2000) (en banc) (ellipses omitted). However, a court “may exercise its  
15     discretion to deny leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the  
16     movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
17     to the opposing party . . . , [and] futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*,  
18     629 F.3d 876, 892–93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S.  
19     178, 182 (1962)).

20      **III. DISCUSSION**

21      Harrell’s SAC alleges seven causes of action against City Defendants and one cause of  
22     action against Individual Defendants. Together, Defendants move to dismiss all eight causes of  
23     action in Harrell’s SAC for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).  
24     Mot. at 2. The Court first evaluates Harrell’s causes of action against City Defendants and then  
25     turns to Harrell’s cause of action against Individual Defendants.

26      **A. City Defendants’ Successive Rule 12(b)(6) Motion**

27      As an initial matter, the Court must address whether to consider City Defendants’

1 arguments in the motion to dismiss. The City Defendants previously filed a Rule 12(b)(6) motion  
2 to dismiss certain causes of action in Harrell's original complaint, but did not challenge all of  
3 Harrell's causes of action against City Defendants. After Harrell filed the FAC, the City  
4 Defendants moved under Rule 12(f) to strike the entire FAC as overbroad and to strike certain  
5 causes of action, but did not move to dismiss under Rule 12(b)(6) any of the seven causes of  
6 action against City Defendants in Harrell's FAC. Harrell has realleged all seven causes of action  
7 in the SAC. Thus, as City Defendants readily acknowledge, City Defendants have filed two prior  
8 Rule 12 motions but have never moved to dismiss under Rule 12(b)(6) all seven causes of action  
9 that Harrell's SAC alleges against City Defendants. *See Reply at 1.* Federal Rule of Civil  
10 Procedure 12(g)(2) prohibits City Defendants from moving to dismiss those causes of action for  
11 the first time at this late stage. City Defendants' arguments to the contrary are unavailing.

12       Federal Rule of Civil Procedure 12(g)(2) states, "Except as provided in Rule 12(h)(2) or  
13 (3), a party that makes a motion under this rule must not make another motion under this rule  
14 raising a defense or objection that was available to the party but omitted from its earlier motion."  
15 Fed. R. Civ. P. 12(g)(2). Federal Rule of Civil Procedure 12(h)(2), in turn, provides that  
16 arguments which pertain to a plaintiff's "[f]ailure to state a claim upon which relief can be granted  
17 . . . may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under  
18 Rule 12(c); or (C) at trial." Thus, as the Ninth Circuit has explained, "Rule 12(g)(2) provides that  
19 a defendant who fails to assert a failure-to-state-a-claim defense in a pre-answer Rule 12 motion  
20 cannot assert that defense in a later pre-answer motion under Rule 12(b)(6)," but instead must  
21 raise the defense through the three avenues permitted by Rule 12(h)(2). *In re Apple iPhone*  
22 *Antitrust Litigation*, 846 F.3d 313, 318 (9th Cir. 2017), *certiorari granted on other grounds by*  
23 *Apple Inc. v. Pepper*, 138 S. Ct. 2647 (June 18, 2018).

24       The procedural history of this case demonstrates that Rule 12(g)(2) bars City Defendants'  
25 instant motion. In this case, Harrell's original Complaint included five of the instant seven causes  
26 of action against City Defendants. Specifically, the Complaint included causes of action against  
27 City Defendants for age discrimination, gender discrimination, failure to prevent harassment,  
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1 retaliation, and violation of 42 U.S.C. § 1983. Compl. ¶¶ 76–93, 100–108, 115–120, 159–164.  
2 City Defendants brought a motion to dismiss under Rule 12(b)(6) that aimed only to dismiss  
3 Harrell’s other causes of action against City Defendants, such as Harrell’s cause of action for  
4 whistleblower retaliation. ECF No. 6 at 2. After the Court granted the motion to dismiss, Harrell  
5 filed the FAC, which again included causes of action against City Defendants for age  
6 discrimination, gender discrimination, failure to prevent harassment, retaliation, and violation of  
7 42 U.S.C. § 1983. FAC ¶¶ 84–100, 107–116, 123–128, 179–184. Harrell also added two new  
8 causes of action against City Defendants, for failure to investigate, *id.* ¶¶ 117–122, and for Title  
9 VII retaliation. *Id.* ¶¶ 185–189. The City Defendants filed a motion to strike the entire FAC as  
10 overbroad and to strike Harrell’s failure to investigate claim as redundant, ECF No. 17, both of  
11 which the Court denied. ECF No. 17. However, City Defendants again filed no Rule 12(b)(6)  
12 objection to Harrell’s five original causes of action against City Defendants or to Harrell’s two  
13 new causes of action against City Defendants. Instead, City Defendants filed an answer to  
14 Harrell’s FAC. ECF No. 18.

15 Then, after the Court granted the motions to dismiss filed by other Defendants—AFSCME  
16 and the Individual Defendants, ECF No. 67—Harrell filed the SAC. The SAC includes Harrell’s  
17 causes of action against City Defendants for age discrimination, gender discrimination, failure to  
18 prevent harassment, retaliation, violation of 42 U.S.C. § 1983, failure to investigate, and Title VII  
19 retaliation. SAC ¶¶ 98–135, 168–178. In the instant motion, City Defendants for the first time  
20 move under Rule 12(b)(6) to dismiss those causes of action. Rule 12(g)(2) plainly prohibits City  
21 Defendants’ motion: “a party that makes a motion under [Rule 12] must not make another motion  
22 under this rule raising a defense or objection that was available to the party but omitted from its  
23 earlier motion.” Fed. R. Civ. P. 12(g)(2). City Defendants made two prior Rule 12 motions, but  
24 despite having the defense available, raised no Rule 12(b)(6) defense to any the seven causes of  
25 action against City Defendants in Harrell’s SAC. Therefore, the Court will not consider City  
26 Defendants’ Rule 12(b)(6) motion, which violates Rule 12(g)(2).

27 City Defendants claim that in *In re Apple*, “the Ninth Circuit recently joined the Third and  
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1 Tenth Circuits and multiple district courts in adopting a flexible approach to permitting successive  
2 Rule 12(b)(6) motions.” Mot. at 3. In *In re Apple*, the Ninth Circuit noted that at times, applying  
3 Rule 12(g)(2) strictly “can produce unnecessary and costly delays” and observed that some district  
4 courts have displayed “practical wisdom” by hearing successive Rule 12(b)(6) motions. 846 F.3d  
5 at 318–19. Thus, the Ninth Circuit stated that “we should generally be forgiving of a district  
6 court’s ruling on the merits of a late-filed Rule 12(b)(6) motion.” *Id.* at 319.

7 To decide whether the district court’s consideration of a late-filed Rule 12(b)(6) motion  
8 was harmless, the Ninth Circuit addressed two factors: 1) whether the defendant’s series of  
9 motions were “filed for any strategically abusive purpose”; and 2) whether declining to consider  
10 the defendant’s late motion “would have substantially delayed resolution” of the standing question  
11 at issue in that case. *Id.* at 320. Thus, the Ninth Circuit affirmed that although Rule 12(g)(2)  
12 facially bars successive Rule 12(b)(6) motions, a district court has discretion to consider a  
13 successive Rule 12(b)(6) motion if the motion does not prejudice the plaintiff and expedites  
14 resolution of the case. *See id.* at 320 (“The district court’s decision on the merits of Apple’s Rule  
15 12(b)(6) motion materially expedited the district court’s disposition of the case, which was a  
16 benefit to both parties.”).

17 For multiple reasons, *In re Apple* does not support City Defendants’ argument. First, as a  
18 matter of procedure, the Ninth Circuit in *In Re Apple* was evaluating whether a district court may  
19 permissibly excuse a Rule 12(g)(2) violation. The Ninth Circuit was not addressing whether a  
20 district court *must* consider certain factors before applying the Rule 12(g)(2) bar. Rather, *In re*  
21 *Apple* provides guidelines for a district court’s discretionary decision to consider a late-filed Rule  
22 12(b)(6) motion and for how the Ninth Circuit should decide whether the district court’s decision  
23 was harmless. *See* 846 F.3d at 320 (considering whether “any error by the district court in  
24 considering the motion on the merits was harmless”). *In re Apple* far from requires a district court  
25 to consider a successive Rule 12(b)(6) motion, as City Defendants concede. Reply at 1.

26 Second, even if the Court considers the two factors discussed by the Ninth Circuit in *In re*  
27 *Apple*, both weigh strongly against excusing City Defendants’ Rule 12(g)(2) violation. The

1 prejudice to Harrell in this case is manifest. Well over a year ago, in August 2017, Harrell filed  
2 her original Complaint. ECF No. 1-1. City Defendants filed two Rule 12 motions, but never once  
3 raised any Rule 12(b)(6) concerns about the seven causes of action Harrell alleges against City  
4 Defendants in the instant motion. Considering City Defendants' Rule 12(b)(6) motion now might  
5 require Harrell to once again amend her pleading, were the Court to grant City Defendants'  
6 motion. If City Defendants had raised the arguments earlier, along with City Defendants' and the  
7 other defendants' prior Rule 12 motions, Harrell could have attempted to address all of  
8 Defendants' concerns in one set of amendments.

9 Moreover, City Defendants' scattershot approach to attacking Harrell's causes of action  
10 impedes speedy resolution of the case. If the Court were to grant City Defendants' motion, the  
11 Court would likely need to grant Harrell at least one opportunity to attempt to amend her  
12 pleadings to respond to the deficiencies first identified in City Defendants' late motion. Any  
13 subsequent motion to dismiss a Third Amended Complaint might not be heard until after the close  
14 of fact discovery in this case, which is May 17, 2019. City Defendants' decision to separate their  
15 Rule 12 arguments across three different Rule 12 motions wastes Court and party resources. It  
16 would have been far more efficient for City Defendants to raise all Rule 12(b)(6) objections in one  
17 motion.

18 Moreover, the factual circumstances of *In re Apple* are easily distinguishable. In *In re*  
19 *Apple*, the district court declined to consider defendant's Rule 12(b)(6) defenses until determining  
20 whether the plaintiff had Article III standing, which would have resolved the entire case. *See* 846  
21 F.3d at 319. The district court had a constitutional obligation to ensure its own jurisdiction before  
22 rendering any ruling on the defendant's Rule 12(b)(6) defenses. *Id.* at 320; *see also Steel Co v.*  
23 *Citizens for a Better Env't*, 23 U.S. 83, 101–02 (1998) (holding that a court may not decide the  
24 merits of a cause of action before ensuring its own Article III jurisdiction). Thus, only after the  
25 plaintiff had sufficiently alleged Article III standing did the district court in *In re Apple* consider  
26 the defendant's Rule 12(b)(6) arguments. *Id.* By contrast, City Defendants' motions in this case  
27 involve the straightforward question of whether Harrell has stated legal claims.

1        In addition, the Court has explicitly relied on City Defendants' failure to raise Rule  
2 12(b)(6) objections to Harrell's causes of action in addressing other Defendants' arguments. For  
3 example, the Court granted Harrell leave to amend her supervisory liability claim against  
4 Individual Defendants in part because City Defendants failed to move to dismiss Harrell's § 1983  
5 claim against City Defendants: “[T]he City of Gilroy and GPD did not move to dismiss Harrell's .  
6 . . § 1983 [claim], which is also premised on an alleged due process violation. Because that claim  
7 survives, the Court is not persuaded that allowing Harrell leave to amend the associated  
8 supervisory liability claim would necessarily be futile.” ECF No. 67 at 29.

9        Finally, City Defendants' failure to timely raise Rule 12(b)(6) objections to the instant  
10 seven causes of action is even more egregious in light of the fact that the same counsel represents  
11 both City Defendants and Individual Defendants. Yet Individual Defendants managed to move to  
12 dismiss under Rule 12(b)(6) all of Harrell's causes of action against Individual Defendants alleged  
13 in the FAC. *See* ECF No. 34 at 2. City Defendants' only excuse for their yearlong delay is that  
14 Harrell amended all of her causes of action in the SAC, which “rendered Causes of Action subject  
15 to Rule 12(b)(6) challenge in a way not presented in [Harrell's] three prior Complaints.” Reply at  
16 1. However, City Defendants cite no authority for the proposition that a plaintiff's amendments to  
17 *previously unchallenged* causes of action obviates Rule 12(g)(2)'s application. Regardless, the  
18 actual text of Harrell's unchallenged causes of action is identical in both the FAC and SAC.  
19 *Compare, e.g.,* FAC ¶¶ 84–92 with SAC ¶¶ 98–106.

20        For all of the above reasons, the Court concludes that Rule 12(g)(2) bars City Defendants'  
21 motion to dismiss all seven of Harrell's causes of action against City Defendants. Accordingly,  
22 the Court DENIES City Defendants' motion to dismiss Harrell's causes of action against City  
23 Defendants for age discrimination, gender discrimination, failure to prevent discrimination and  
24 harassment, failure to investigate or take corrective action, retaliation under Cal. Gov. Code §  
25 12940, and Title VII retaliation.<sup>1</sup>  
26

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27       <sup>1</sup> Below, the Court addresses Harrell's cause of action against City Defendants for violation of  
28 civil rights under § 1983, which is necessarily implicated by Individual Defendants' motion to

1                   **B. Defendants' Successive Rule 12(b)(6) Motion**

2                   The Court's denial of City Defendants' successive motion leaves only Individual  
3 Defendants' motion to dismiss Harrell's cause of action against all Individual Defendants for  
4 supervisory liability under § 1983. The Court previously granted Individual Defendants' motion  
5 to dismiss the supervisory liability claim because Harrell did not contest that the FAC failed to  
6 state a claim for supervisory liability. ECF No. 67 at 28. The Court granted Harrell leave to  
7 amend and instructed Harrell that "she must plead specific facts that tie each Defendant against  
8 whom she asserts the supervisory liability claim to the alleged deprivation of her right to due  
9 process." *Id.* at 29. Harrell has now realleged the supervisory liability claim. SAC ¶¶ 136–167.

10                  **1. Supervisory Liability Under § 1983**

11                  "A defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his  
12 or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection  
13 between the supervisor's wrongful conduct and the constitutional violation.'" *Starr v. Baca*, 652  
14 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)).  
15                  "The requisite causal connection can be established . . . by setting in motion a series of acts by  
16 others or by knowingly refusing to terminate a series of acts by others, which the supervisor knew  
17 or reasonably should have known would cause others to inflict a constitutional injury." *Id.* at  
18 1207–08 (internal citations, quotation marks, and alterations omitted).

19                  The gravamen of Harrell's supervisory liability claim is that during GPD's 2015  
20 investigation into Harrell's behavior toward trainees, Harrell did not receive adequate notice of  
21 "the nature or content of the investigation" prior to Harrell's investigation interview. *Id.* ¶¶ 140–  
22 142. Harrell alleges that each of the Individual Defendants "participated in the violation . . . by  
23 failing to provide adequate training, supervision, discipline, and control of Gilroy Police officers  
24 regarding the Public Safety Officers' Bill of Rights." *Id.* ¶ 138.

25                  Individual Defendants contend that the Court should dismiss the supervisory liability claim  
26 because Harrell has failed to allege an underlying § 1983 claim for violation of Harrell's

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27                  dismiss Harrell's supervisory liability cause of action.  
28

1 Fourteenth Amendment procedural due process rights. Mot. at 15–20; *see Watkins v. City of*  
2 *Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (noting that a supervisor’s liability depends on  
3 finding that subordinate officer violated plaintiff’s constitutional rights). The Court agrees with  
4 Individual Defendants, and thus does not reach Individual Defendants’ alternative argument that  
5 the Individual Defendants are entitled to qualified immunity.

6 Here, Harrell alleges that GPD violated her constitutional rights because GPD failed to  
7 provide Harrell notice of the nature of the 2015 investigation in contravention of the Public Safety  
8 Officers’ Bill of Rights (“PSOBR”). On September 1, 2015, Svardal provided Harrell with a  
9 written notice of the investigative interview. SAC ¶ 144. The notice stated that the investigation  
10 concerned Harrell’s “possible violations of the City’s Human Resources Rules and Regulations,”  
11 but did not specify the violations. *Id.* Harrell alleges that other Individual Defendants also failed  
12 to inform Harrell of the investigation against her, and that all Individual Defendants “knew or  
13 should have known” that Svardal’s notice was deficient under the PSOBR. *See, e.g., Id.* ¶¶ 149,  
14 154–55. For example, Harrell alleges that GPD’s Human Resources Director LeeAnn McPhillips,  
15 who was copied on Svardal’s notice, violated Harrell’s constitutional rights by failing to inform  
16 Harrell of the nature of the investigation against her. *Id.* ¶ 159.

17 The PSOBR provides certain procedural rights to public safety officers. For example,  
18 “[n]o punitive action . . . shall be undertaken by any public agency against any public safety  
19 officer who has successfully completed the probationary period that may be required by his or her  
20 employing agency without providing the public safety officer with an opportunity for  
21 administrative appeal.” Cal. Gov. Code § 3304(b). As relevant to this case, the PSOBR requires  
22 that when a public safety officer is subject to an investigative interview, the officer “shall be  
23 informed of the nature of the investigation prior to any interrogation.” Cal. Gov. Code § 3303(c).

24 For multiple reasons, Harrell has failed to state an underlying procedural due process  
25 claim. As an initial matter, the PSOBR is inapplicable to Harrell because she was a dispatcher at  
26 GPD, not a sworn public safety officer. The PSOBR defines “public safety officer” as “all peace  
27 officers specified” in several sections of the California Penal Code. Cal. Gov. Code § 3301.

1 Harrell does not allege in her SAC that a dispatcher is a public safety officer or that any of the  
2 relevant Penal Code provisions support the conclusion that the PSOBR applies to Harrell. Nor do  
3 the Penal Code provisions support such a conclusion. For example, California Penal Code § 830.1  
4 defines “peace officer” to include “any police officer, employed in that capacity and appointed by  
5 the chief of police or chief, director, or chief executive of a public safety agency, of a city.” Cal.  
6 Penal Code § 830.1(a). Noticeably absent from that provision is any reference to civilian  
7 employees of municipal police departments. The remaining California Penal Code provisions  
8 referenced in the PSOBR all identify law enforcement officers employed by other public agencies  
9 as public safety officers. *See, e.g.*, Cal. Penal Code § 830.33(c) (providing that members of transit  
10 agency police departments whose “primary duty . . is the enforcement of the law” are “peace  
11 officers”). Thus, the PSOBR does not apply to Harrell, who was a communications professional  
12 with the GPD, not a police officer.

13 Harrell readily admits the foregoing, but contends that GPD self-imposed a duty to comply  
14 with the PSOBR. Harrell argues in her opposition that when GPD investigated Harrell in 2008,  
15 GPD stated in the pre-interview notice that “This interrogation shall comply with the Public Safety  
16 Officers’ Bill of Rights, Government Code section 3300 and following.” Opp. at 28. Thus,  
17 Harrell contends, GPD’s notice “conferred upon” Harrell due process rights under the PSOBR.  
18 However, while Harrell’s SAC discusses the differences between the 2008 and 2015 pre-interview  
19 notices, Harrell’s SAC includes no allegation that the 2008 notice provided Harrell with due  
20 process rights. More importantly, even if the SAC did not include such an allegation, Harrell  
21 cannot claim a Fourteenth Amendment due process interest in GPD’s compliance with the  
22 PSOBR.

23 Under the Fourteenth Amendment, “a threshold requirement to a substantive or procedural  
24 due process claim is the plaintiff’s showing of a liberty or property interest protected by the  
25 Constitution.” *Wedges/Ledges of Cal., Inc. v. City of Phx., Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994)  
26 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)). “A protected property interest is present  
27 where an individual has a reasonable expectation of entitlement,” which is ““determined largely by

1 the language of the statute and the extent to which the entitlement is couched in mandatory  
2 terms.”” *Id.* (quoting *Ass ’n of Orange Cty. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir.  
3 1983)). Procedural requirements only create a protected property interest “if the procedural  
4 requirements are intended to be a significant substantive restriction on . . . decision making.” *Id.*  
5 (internal quotation marks and citation omitted).

6 The problem for Harrell is that the Ninth Circuit has squarely held that the PSOBR’s notice  
7 requirements do not create a property interest cognizable under the Fourteenth Amendment. In  
8 *Stiesberg v. California*, 80 F.3d 353 (9th Cir. 1996), the Ninth Circuit held that the PSOBR  
9 “merely provides procedural safeguards that should apply” when a police department takes  
10 punitive action against a public safety officer. *Id.* at 357. Thus, the Ninth Circuit held, the  
11 PSOBR does not create the “significant substantive restriction” on government decision-making  
12 necessary to create a due process property interest. *Id.* at 357; *see also C.R. v. Seattle Pub. Schs.*,  
13 693 F. App’x 505, 506 (9th Cir. 2017) (“[A] protected property interest can be derived from state  
14 laws and regulations, but there is no constitutionally protected property interest in strict  
15 compliance with state laws and regulations.”) (emphasis removed). In other words, the Ninth  
16 Circuit has held that non-compliance with the PSOBR does not equate to a constitutional  
17 violation. *Id.* Thus, regardless of whether Harrell thought the language in GPD’s 2008 notice  
18 entitled her to a PSOBR-compliant interview in 2015, Harrell did not have a due process interest  
19 in GPD’s compliance with the PSOBR.

20 Because Harrell has not adequately alleged an underlying constitutional violation, Harrell  
21 cannot state a claim against any of the Individual Defendants for supervisory liability under §  
22 1983, and Harrell’s cause of action for supervisory liability must be dismissed.

23 The Court’s conclusion that Harrell has not adequately alleged a Fourteenth Amendment  
24 violation also requires the Court to dismiss Harrell’s § 1983 cause of action against City  
25 Defendants, which relies on the same alleged Fourteenth Amendment violation as the basis for  
26 municipal liability. *See Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994) (holding that “the  
27 liability of municipalities [under § 1983] . . . is contingent on a violation of constitutional rights”).

1       Further, the Court will dismiss Harrell’s § 1983 causes of action with prejudice. In the  
2 Court’s order dismissing claims from Harrell’s FAC, the Court noted that “Harrell asserts that if  
3 granted leave to amend [the supervisory liability cause of action], Harrell would specify that she  
4 was denied her right to due process guaranteed by the Fourteenth Amendment because she was  
5 denied information about the nature of the internal affairs investigation of her in 2015.” ECF No.  
6 67 at 29. The Court granted Harrell leave to amend on that basis. The Court, however, informed  
7 Harrell that “she must plead specific facts that tie each Defendant against whom she asserts the  
8 supervisory liability claim to the alleged deprivation of her right to due process,” and informed  
9 Harrell that failure to remedy that deficiency would result in dismissal with prejudice. *Id.* at 29–  
10 30. Harrell has failed to remedy the deficiency. As outlined above, Harrell predicates her  
11 supervisory liability claim against Individual Defendants and her § 1983 claim against City  
12 Defendants on GPD’s failure to comply with the PSOBR, but Harrell is not subject to the PSOBR.  
13 That fact—as Harrell herself admits—will not change between now and a putative Third Amended  
14 Complaint, which renders any amendment futile. *See Leadsinger, Inc. v. BMG Music Pub.*, 512  
15 F.3d 522, 532 (9th Cir. 2008) (a district court may deny leave to amend where “any amendment  
16 would be futile”).

17        In addition, granting Harrell leave to amend to file a Third Amended Complaint would  
18 cause “undue prejudice to the opposing party.” *Leadsinger*, 512 F.3d at 532 (internal quotation  
19 marks and citation omitted). The fact discovery cutoff in this case is May 17, 2019. ECF No. 65.  
20 If Harrell files another pleading in this case, any subsequent motion to dismiss might not be heard  
21 until after that fact discovery cutoff. There is no time for yet another round of briefing on a  
22 motion to dismiss, and requiring City Defendants to file a fourth Rule 12 motion would cause City  
23 Defendants undue prejudice.

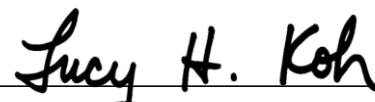
24 | IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Individual Defendants' motion to dismiss Harrell's cause of action for supervisory liability under § 1983 with prejudice; dismisses Harrell's cause of action against City Defendants for violation of federal civil rights under § 1983; and

1 DENIES City Defendants' motion to dismiss Harrell's remaining six causes of action.

2 **IT IS SO ORDERED.**

3 Dated: February 5, 2019

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5 LUCY H. KOH  
6 United States District Judge

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